

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PATRICK BRADY, et al.,

Plaintiffs,

-vs-

CIVIL ACTION NUMBER:

NO. 02-2917 (JEI)

**AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL,**

MOTION

Defendant.

Mitchell H. Cohen United States Courthouse
One John F. Gerry Plaza
Camden, New Jersey 08101
Friday, January 4, 2013

B E F O R E:

**THE HONORABLE JOSEPH E. IRENAS
UNITED STATES DISTRICT JUDGE**

A P P E A R A N C E S:

TRUJILLO, RODRIGUEZ & RICHARDS, LLC
BY: LISA J. RODRIGUEZ, ESQUIRE
NICOLE M. ACCHIONE, ESQUIRE
Counsel for Plaintiffs

GREEN JACOBSON, P.C.
BY: ALAN P. PRESS, ESQUIRE
Counsel for Plaintiffs

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
BY: JAY COHEN, ESQUIRE
DANIEL J. TOAL, ESQUIRE
Counsel for Defendant

ARCHER & GREINER, P.C.
BY: JOHN C. CONNELL, ESQUIRE
Counsel for Defendant
(Appearances continued on Page 2)

Certified as true and correct as required by Title 28,
U.S.C., Section 753.

/s/ Karen Friedlander, CCR, RMR

1 A P P E A R A N C E S C O N T I N U E D :

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KATZ & RANZMAN, P.C.

3 BY: DANIEL M. KATZ, ESQUIRE

Counsel for Defendant

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1 THE DEPUTY CLERK: All rise.

2 THE COURT: Who are these people? Why are they here?

3 Everybody please be seated and good morning.

4 MS. RODRIGUEZ: Good morning.

5 RESPONSE: Good morning.

6 THE COURT: How old is this case?

7 MR. PRESS: Going on 11 years, Judge.

8 THE COURT: Well, this is an 11-year motion to amend
9 the answer to a case which has been half-tried already. So
10 may I first have the appearances of counsel.

11 MS. RODRIGUEZ: Good morning, Your Honor. Lisa
12 Rodriguez from Trujillo, Rodriguez and Richards, and also with
13 me is Nicole Acchione from the same firm.

14 MS. ACCHIONE: Good morning.

15 THE COURT: Good morning.

16 MR. PRESS: Alan Press is here for plaintiffs, as
17 well.

18 THE COURT: Can't forget you.

19 MR. COHEN: Your Honor, Jay Cohen from Paul, Weiss
20 for defendant, with Mr. Toal, Mr. Connell and Mr. Katz.

21 MR. KATZ: Good morning, Judge Irenas.

22 THE COURT: Good morning. Mr. Katz is certainly a
23 familiar face.

24 MR. KATZ: Thank you, Your Honor.

25 THE COURT: Well, it's a motion to amend. And

1 specifically, it's a motion to amend to add a separate
2 defense. It's No. 7. It's one short sentence, and it's to
3 add mitigation. I will get into that a little bit, but add
4 mitigation as a separate defense.

5 As I see the case, a certain element of mitigation was
6 already in the case, because remember, to the extent you're
7 subtracting prior earnings -- subsequent earnings of the
8 pilots, that's mitigation. And I think it's very clear from
9 the record here that that was in the case from Day 1.

10 I mean, the idea was that if a pilot, assume, started a
11 gardening business, you know, and was making money, that
12 whatever he made in that business was going to be credited
13 against whatever he lost. If he was a pilot, that means, I
14 assume, he got a pilot's job of any kind, for lesser pay or
15 the same pay or more pay, that that would be counted against
16 whatever damages he was entitled to. Do we all agree to that?

17 MS. RODRIGUEZ: Yes.

18 THE COURT: That was never an issue. And that's
19 mitigation. So to some degree, there's always been in the
20 case, very clearly from the notices that were sent out to the
21 pilots in many other ways, that that was going to be a credit
22 the defendant was entitled to against any damage claim,
23 because I think a fair number of these pilots did continue
24 piloting. Sometimes they piloted for other organizations.
25 They may have gone to a freight, for instance, a freight

1 forwarder of some kind and done that kind of piloting, and in
2 some cases they did other work.

3 I remember a few cases where they actually did other
4 non-piloting work and then maybe went back to piloting later
5 on, and in some cases didn't go back to piloting later on. I
6 think you have both of those kinds of situations.

7 What really is being sought to be added here is the
8 notion of effort, if you want to put it -- that a pilot is
9 obligated. That's the defense, to make an effort to maximize
10 his earnings, and that if a pilot decided, well, I'll take an
11 easier job, or I'll take no job, I'll just stay home and, you
12 know, become a housewife or house husband, you know, and just
13 do nothing. Or as they say, take a very simple job, a
14 low-stress job compared to a pilot's job, you know, take some
15 kind of a low-stress job for a lot less money, and in effect,
16 not maximize efforts to get a job that's closely equivalent to
17 the one that the pilot had -- he or she had before the events,
18 which are the subject matter of this case, took place.

19 And so in a funny way, it's an expansion of the
20 mitigation defense rather than a brand-new defense, because,
21 again, actual earnings, which have never been in dispute,
22 would be deducted from any damage for a particular pilot.

23 So just with that observation -- Mr. Cohen, are you
24 going to do the argument?

25 MR. COHEN: Yes, Your Honor.

1 THE COURT: Okay, then, it's your motion.

2 MR. COHEN: Yes, Your Honor.

3 THE COURT: I must say, it wasn't very long. I saw
4 this big stack of paper and I thought, oh, I'm going to have
5 to read another one. It turns out I only had to read about
6 three pages because the next new complaint -- a new answer,
7 excuse me.

8 MR. COHEN: Right.

9 THE COURT: A new amended answer, only had one
10 sentence.

11 MR. COHEN: Right. Well, it's hard to write a lot of
12 words about one sentence so --

13 THE COURT: Yes, so -- oh, no, I'm not complaining.
14 Don't take that as a complaint on my part.

15 MR. COHEN: I didn't take it as a complaint, Your
16 Honor.

17 Look, I think Your Honor has actually grasped the
18 issue, and if you think about it, at least a very odd set of
19 circumstances, because under the plaintiff's view of what
20 should appropriately be deducted from damages. Somebody who
21 goes out, actually puts in the effort, as Your Honor said it,
22 gets another job, and has a setoff against damages because, in
23 fact, you should not be better off than you would have been
24 had you continued to be where you think you should have been
25 on a seniority list at TWA or a new airline. So people --

1 THE COURT: Well, it would be an American.

2 MR. COHEN: American, yes. So you go out and you
3 get -- so people go out and get a new job, are going to get
4 that deducted.

5 People who say, I don't want to do anything, I don't
6 want to be a pilot, and probably would not have been a pilot
7 had they continued at American, that's a logical inference
8 from that, they do better, if you don't take into account what
9 we are calling mitigation. I mean, the fact of the matter is,
10 that it is, you know, I don't like to use the word "windfall"
11 prematurely.

12 THE COURT: What's trouble -- let me tell you what is
13 a little troublesome to me.

14 MR. COHEN: Yeah.

15 THE COURT: Is that -- that we get into intent, what
16 is a person's intent, and we -- you know, it becomes a very
17 fact-intensive inquiry. It's a person-by-person inquiry. You
18 do need -- it's not something that can be determined outside
19 of the jury. I mean, I don't know that it would be
20 permissible for me to say, okay, I'll set up some
21 administrative, I'll appoint a magistrate or I'll appoint a
22 master under Rule 50-something, appoint a special master to,
23 you know, review the cases one by one. I'm not sure I even
24 have a right to do that.

25 MR. COHEN: Yeah, but, Your Honor, I think that --

1 THE COURT: Am I right on that?

2 MR. COHEN: You are right, Your Honor.

3 THE COURT: It would be -- there's a jury.

4 MR. COHEN: Right.

5 THE COURT: And there would be a jury verdict. A
6 person by person. Well, if you're going to have that, then
7 there's discovery, because we have not had discovery on that,
8 and it's not -- I mean, it's one thing to take discovery on
9 past pay, because you can do that by charts. Under the
10 Federal Rules of Evidence, there are about two different
11 approaches of creating summary, summary evidence, which is
12 permissible to bring before a jury.

13 MR. COHEN: Right. A thousand-and-something.

14 THE COURT: A thousand and six, I think. It's -- I
15 had a nine-and-a-half-month trial involving very complex tax
16 evasion. A lot of the evidence was put in -- there were, I
17 think, a million marked documents at some point. I mean, in
18 the -- we had a, you know, like a repository, we had
19 repository, we had three of them around the state, repository
20 of documents. I don't know if there was a million, a lot of
21 them. I think 20,000, actually separately, actually went into
22 evidence, but the key evidence were charts, basically -- were
23 basically summaries or charts.

24 And there are two different approaches of the rules of
25 evidence for that. One is when the underlying documents are

1 in evidence, and one, when the underlying documents are not in
2 evidence.

3 MR. COHEN: A summary of voluminous evidence.

4 THE COURT: What?

5 MR. COHEN: A summary of voluminous evidence.

6 THE COURT: Right, exactly. And so, fine, we were
7 able to get lots of stuff before the jury. I hate to use the
8 word "efficiently," but for a nine-and-a-half-month trial, but
9 -- a nine-and-a-half-month jury trial. But -- and criminal to
10 boot, which makes it even tougher. But it was. It was --
11 given the immense volume of documents and the state of
12 technology at that time, it was '97, '98. You know, it seemed
13 like long ago, but the technology in handling voluminous
14 documents is much better now than it was then.

15 MR. COHEN: Your Honor --

16 THE COURT: But here, I can't put -- I can't create a
17 table. I mean, it's a very fact-intensive point.

18 MR. COHEN: I think you might be able to create a
19 table, Your Honor. Let me say a couple things.

20 THE COURT: Okay. You understand where I'm --

21 MR. COHEN: I understand precisely. Your Honor is
22 concerned about how you are going to manage this trial with
23 this issue in it, and I understand that. So I have --

24 THE COURT: Not just the trial, manage discovery.

25 MR. COHEN: Well, I think the discovery will be

1 fairly easy. Let me get to that in a second.

2 But I think there are two or three layers of answer.

3 One is, and I'm going to go right past this, but I do need to
4 say it. We do think under the Walmart's -- under the Supreme
5 Court's Walmart decision, they do have to prove damages person
6 by person. How you do it in a context of a trial, because no
7 one is expecting 2300 people to testify, and that is obviously
8 not the way we would intend to conduct the trial.

9 I do think that it can be done in the same kind of
10 summary fashion. It will be a little bit messier, but it can
11 be done in the same kind of summary fashion as, in fact, what
12 they are calling the setoff damages.

13 Now, when they sent out their questionnaire, do you
14 remember when we were last here, Your Honor --

15 THE COURT: Yes, but in the Walmart case you are
16 dealing with the primary claim. You were saying -- the
17 Supreme Court said you got to prove -- what was that, women --

18 MR. COHEN: Women discrimination.

19 THE COURT: Prejudice against women in
20 promotion and -- promotion and advancement.

21 MR. COHEN: Correct.

22 THE COURT: And pay rates within the company. So
23 that's the primary claim, at Supreme Court, yeah. You can't
24 bury the fact that if Miss Jones, you know, worked in Ohio in
25 a Walmart in Columbus, you have to prove whatever it is --

1 MR. COHEN: Right. But I do think, Your Honor, the
2 same thing.

3 THE COURT: This is not the same. This is not the
4 primary claim. We are talking about the defense --

5 MR. COHEN: -- look at Walmart -- post-Walmart and
6 apply it to damages, as well.

7 But here is what we have in mind, Your Honor. And we
8 could have done this in one shot, but I still think we could
9 do it in two. The plaintiff sent questionnaires in early
10 December, after we were last here, to members of the class,
11 asking for --

12 THE COURT: Early December just a month ago?

13 MR. COHEN: Yes. Remember, we were here on
14 November 15th.

15 THE COURT: Yeah.

16 MR. COHEN: And in early December, questionnaires
17 went out. And Your Honor, in your last order, directed them
18 to give us certain information by December 31 and the
19 remainder by January 31, and that's proceeding. That's
20 proceeding.

21 THE COURT: Well, I'm glad someone is listening to
22 one of my orders.

23 MR. COHEN: In connection -- in connection with that
24 mailing, we asked the plaintiffs, we said, we think if you ask
25 a small number of additional questions with respect to efforts

1 to acquire work, right, that will give us the information that
2 we need for mitigation, in addition to setoff.

3 They refused to do that. So that means that what we
4 would suggest, Your Honor, is, clearly there is something
5 wrong with the world, where somebody who actually goes out and
6 gets a job does worse -- I mean, you could have two pilots in
7 this case, under their theory, who are on the same -- exactly
8 the same line.

9 THE COURT: Ask the Tea Party. They think that's the
10 way it is in this country.

11 MR. COHEN: Yeah. But we're not sure it should be
12 the rule, Your Honor.

13 And we can send out a short questionnaire to the same
14 people that they sent it out to, that asked them to describe
15 their efforts to get work. It seems to us that we can
16 aggregate that information in a way and argue to Your Honor
17 that those folks should fit into certain categories, and that
18 their effort in that way -- we're not suggesting that each
19 person will say, okay, you said you looked for a job, and you
20 looked on Tuesday, how many hours did you look on Tuesday, how
21 about on Wednesday --

22 THE COURT: And given the time frames here, a lot of
23 that information -- you know, it's one thing if you asked
24 somebody what did you do six months ago to go find a job, you
25 know, that person --

1 MR. COHEN: Right.

2 THE COURT: -- would -- even if they're not a good
3 record keeper, would have memory of some of those efforts. Go
4 back 11 years ago or ten years ago or nine years ago or eight
5 years ago, sometimes they might not have that kind of
6 information.

7 MR. COHEN: The information may not be perfect. The
8 information they're collecting is not going to be perfect.
9 You know, they've received information on wages from only a
10 couple hundred people, so far. Half the people sent in
11 documents, half the people didn't send in documents. We're
12 going to have data issues no matter what.

13 But respectfully, what I would say, Your Honor, is,
14 that's not a reason to not allow us to pursue a defense, which
15 we think is firmly grounded in the law, will make all of these
16 arguments about whether or not they should have done it or
17 shouldn't have done it, our merits arguments. They are
18 certainly not whether we should be able to assert a defense.

19 And we are not suggesting 2300 depositions, obviously,
20 or even 230 or even 23, to find out what people did. What
21 we're saying is, we are entitled to basic information.

22 It would have been efficient if the plaintiffs had
23 agreed to just tack it onto their questionnaire. They didn't,
24 so we'll do it, if Your Honor permits. But, you know, to
25 deprive us of a defense, which is a fundamental damages

1 defense because, you know, it may be complicated. We don't
2 think it's that complicated. How we will present it at trial
3 is a real issue, Your Honor. We will have to grapple with
4 that. But what we would say is, that's not a reason to deny
5 us the discovery.

6 You ultimately may decide that there's no efficient
7 way, that the information is not, you know, is not
8 sufficiently reliable to be introduced. We are a long way
9 away from that. But rather than talk at all of the problems
10 might be, let us just get the information and -- you know,
11 it's the same 2300 recipients -- it's really fewer but a bunch
12 of them are actually not damage -- don't have damages.

13 THE COURT: Yeah, but a small number because of the
14 way the stapling was --

15 MR. COHEN: 600.

16 THE COURT: Because of the way the stapling was done.

17 MR. COHEN: I think it's about 600, Your Honor.

18 THE COURT: At some point there are pilots who really
19 didn't suffer.

20 MR. COHEN: Yeah, I think that's what it says.

21 THE COURT: But I don't know what the -- I don't know
22 what the number is.

23 MR. COHEN: I think their expert said it's a quarter
24 of the class. Let's just take that as proxy.

25 THE COURT: I don't know.

1 MR. COHEN: Yeah. So what I'm saying is, for those
2 1500 or so folks for whom they are collecting setoff
3 information, we can collect information about what they did to
4 try to look for work, and I think the information will suggest
5 a pattern when we get it.

6 I think that will be very hard for us to prove in the
7 context of a class action, that somebody who was out looking
8 for work should have tried harder but, for example, one of the
9 named plaintiffs, Sally Young, you know, we've given Your
10 Honor her testimony.

11 THE COURT: Well, she's flying now, isn't she?

12 MR. COHEN: I don't know what she's doing now. But
13 there was a period of time --

14 THE COURT: At some point she did go back flying. I
15 can't remember whether it was for American or somebody else,
16 but I know she went -- she did go back as a pilot at some
17 point.

18 MR. COHEN: But we are going to find some folks who
19 simply dropped out of the workforce, and you know, there are
20 going to be some reasonably bright lines in this information,
21 and we will have to confront how we deal with the lines that
22 are not so bright. But I think it's premature to worry about
23 the presentation for us at trial.

24 We are mindful of it. We understand that we are going
25 to have to introduce in a way that allows you to try a case

1 efficiently, and we intend to do that in the same way that the
2 damages and setoff numbers are going to be tried in an
3 efficient way. We are not going to have 2300 people come in
4 here and say, yes, these are my tax returns and, yes, this is
5 what I earned, and I'm not really holding back any money.
6 They've collected certifications under oath.

7 I mean, we may want to test some of them, if we think
8 there are some outliers, and they may want to do the same
9 thing with some of our allegations.

10 But we're -- you know, I think there's been a gross
11 exaggeration about the effort. It could have been underway
12 already if they had simply put our questions onto theirs. But
13 we're prepared to do it. And, you know, they are collecting
14 their information in two months. That's the period of time
15 for which they've got these questionnaires out. We can get
16 the questions out in a few days. If they don't want to give
17 us the addresses of the class, we'll give it to them to mail,
18 as long as it comes back to us. And we can do that.

19 So, you know, the question is, Your Honor, there's just
20 a fundamental unfairness. There is a potential for windfall
21 for people who were really not in the workforce. And that's
22 really what we're trying to get, who really did not try to get
23 a job.

24 Yes, if this was an individual case, we would have the
25 opportunity to go in great detail about the plaintiff's

1 individual efforts. We understand the limitations in a class
2 action. We will have to come up with a way of demonstrating
3 this, in a way that's efficient. So that's all we're trying
4 to do, Your Honor.

5 THE COURT: Okay. I don't know who's going to handle
6 the argument for the plaintiffs.

7 MS. RODRIGUEZ: Your Honor, I hear Mr. Cohen talk
8 about fundamental unfairness, and I've spent the last couple
9 days reading a lot of cases on mitigation -- motions to amend,
10 and fundamental unfairness was not a term that I found in any
11 of the cases that I read.

12 There are three terms that continually present
13 themselves and that is whether the amendment was sought in a
14 pragmatically sufficient time, whether there's prejudice --

15 THE COURT: Pragmatically sufficient time.

16 MS. RODRIGUEZ: Pragmatically sufficient time.

17 THE COURT: Okay.

18 MS. RODRIGUEZ: Whether there was prejudice and
19 whether the amendment will cause delay.

20 Mr. Cohen talks about, it's premature to worry about
21 the presentation at trial, but that's exactly what Your Honor
22 has to worry about in this case that's almost eleven years
23 old.

24 The answer to this case was initially filed in early
25 2005. It was filed before the motion for bifurcation, several

1 months before the motion for bifurcation.

2 THE COURT: Okay. The bifurcation of this case came
3 fairly late in the game.

4 MS. RODRIGUEZ: It came late in the game, but it also
5 just happened in 2005. It was after the motion to amend. So
6 in their briefing, they say the issue of mitigation didn't
7 arise until after the liability trial. But that is an issue
8 that was addressed squarely by the Court in Resolution Trust
9 versus American National Bank. And that Court makes clear
10 that the issue of mitigation arises when the lawsuit is filed.
11 Pure and simply.

12 So it wasn't raised in the Answer, it wasn't raised in
13 any of the pretrial proceedings. It wasn't raised after the
14 trial. It wasn't raised before the motions of the expert
15 reports were filed. It was not raised until after plaintiffs
16 filed their expert reports, and now, all of a sudden, the
17 motion for mitigation is filed.

18 THE COURT: I don't -- you're right, there wasn't a
19 formal raising of the issue. The issue is really defined by
20 me, and that the type of -- or part of mitigation that was
21 really the subject of their motion, because we do have some
22 mitigation. But facts which indicated that there might be
23 that kind of mitigation, there were no -- were no in this
24 case.

25 This is not a case where facts suddenly popped up late

1 in the game that nobody knew about earlier that suggested a
2 mitigation issue.

3 MS. RODRIGUEZ: Well, Your Honor --

4 THE COURT: The fact that we knew -- I mean, I knew
5 that there were -- that the response of the pilots who had
6 been affected adversely, you know, by the merger, included
7 some people who strove to stay in the business, as best they
8 could as pilots, and those -- and that there were some
9 who didn't.

10 Those facts were known. I knew them.

11 MS. RODRIGUEZ: Well, the facts were known, but the
12 defense wasn't raised.

13 THE COURT: Well, that is different -- that's not
14 saying it's not like a case where some facts come up that
15 nobody knew about. There are cases sometimes where things
16 come up at just the eve of trial that literally nobody knew
17 about. And we try to -- as a court and as lawyers, we try to
18 deal with them. We may wind up -- hey, I've had cases where I
19 ordered depositions during a trial, you know what I mean?
20 They try the case through the day and they take depositions in
21 the evening, you know, because something really new came up
22 that nobody knew about.

23 But we knew, and I'm addressing this, really, to
24 Mr. Cohen, as well, for when he rebuts, that we knew there was
25 a great mixture of responses way back. I mean, you know, as I

1 say, some people strove very hard to stay in the pilot
2 business, you know, with varying degrees of success, but at
3 least it was pretty clear from the record they were trying.
4 They would go to work for, as I say, a freight -- a freight
5 forwarder of some kind, or a very small -- they'd fly for a
6 very small regional carrier, where they had been flying, you
7 know, big passenger jets for their original employer.

8 But we also knew there were people who said, well, I'll
9 use this occasion maybe to change my lifestyle, maybe go into
10 some other kind of work, stay out of the labor market
11 altogether. We knew that. I mean, I can't give you a
12 citation right now, but it was in my mind-set that the
13 responses were very different.

14 And I don't know if this helps Mr. Cohen, because I
15 think it was -- there were facts known to the parties, and to
16 the defense specifically, that might have suggested a broader
17 mitigation defense than the one that actually was being
18 allowed up to this motion.

19 MS. RODRIGUEZ: As early -- well, at least as early
20 as May of 2012, defendants stood here and talked -- in
21 connection with one of the motions about possible discovery
22 that might be needed in the defense phase, and they talked
23 about far-reaching things, like whether somebody could fly in
24 China, and at that point, we raised it. The mitigation is not
25 in the case. And that was in May, and we didn't see a motion

1 in May. We didn't see a motion in June, we didn't see a
2 motion in July.

3 THE COURT: Okay. I get it, I get it.

4 MS. RODRIGUEZ: There's a case that's remarkably on
5 point, and it's an older case, it's a 1989 case out of the
6 District of Illinois, and I think, Your Honor, if you would
7 read it, would find it fairly amusing because the case starts
8 by saying, this case came to this Court's calendar somewhat
9 bewhiskered, nearly three years old. And I think if the judge
10 thought that bewhiskered was three years old, he would have
11 quite a lot to say about an 11-year-old case. But in that --

12 THE COURT: Who was the judge? Not Zagle.

13 MS. RODRIGUEZ: Shadur, Shadur.

14 THE COURT: Oh, yeah. Well, he's a very cautious --
15 Shadur is, what can I say? I've been on panels with him.
16 He's -- if "close" the right word? You know, he's not a
17 fly-off-the-handle type of judge, let me put it that way.

18 MR. COHEN: He's a very experienced judge.

19 THE COURT: What?

20 MR. COHEN: He's a very experienced judge, Your
21 Honor.

22 THE COURT: He's very experienced, very serious type
23 of person. I'm going to his personality. You know, I
24 remember that he would -- he hated speaking off the cuff.
25 When he was going to speak, he liked to have it all written

1 out before, you know. Some judges, whose name I won't
2 mention, you know, just give whatever random thought popped
3 into their head -- my head, a head, and the -- but I remember
4 seeing Judge Shadur, you know, he wanted to have it all
5 written out so it came out right, and he was that type -- and
6 I say this in praise. He's a -- I consider him a very, very
7 good judge.

8 MS. RODRIGUEZ: Well, the cite to that case is 1989,
9 US District, Lexus 3558.

10 THE COURT: Is that in your papers?

11 MS. RODRIGUEZ: It is not, Your Honor. I just found
12 it.

13 THE COURT: Then let me have the name of it.

14 MS. RODRIGUEZ: It's G-U-D-Y-K-A Sales Company --

15 THE COURT: G-U-D -- G-U-D.

16 MS. RODRIGUEZ: G-U-D-Y-K-A Sales Company, versus
17 Lacy Forest Products, and it's 1989.

18 THE COURT: Where is this, Forest?

19 MS. RODRIGUEZ: Lacy Forest Products, L-A-C-Y.

20 MR. COHEN: Do you have a copy for us, by any chance?

21 MS. RODRIGUEZ: I'm sorry, I just came across it last
22 night while I was preparing.

23 THE COURT: Do you have that down?

24 Okay. And what's the --

25 MS. RODRIGUEZ: It's 1989, US District, Lexus 3558.

1 THE COURT: Okay.

2 MS. RODRIGUEZ: In that case, following a finding of
3 liability in a bifurcated action, the defendants moved to
4 amend the answer to add mitigation to damages. And the Court
5 made a distinction between the actual earnings at issue and
6 earnings that could have been earned.

7 THE COURT: And I came up with that?

8 MS. RODRIGUEZ: And you came up with that --

9 THE COURT: I think the same way Shadur did without
10 actually reading anything?

11 MS. RODRIGUEZ: And the Court found that actual
12 earnings at issue -- you know, everybody kind of knows that
13 mitigation being pled or not pled, that's an issue when you're
14 talking about loss.

15 THE COURT: It defines -- that was my -- what was
16 going through my head, that defines loss, in a way.

17 MS. RODRIGUEZ: That defines loss.

18 THE COURT: And as I say, it's very clear to me that
19 that was in the case, going way back.

20 MS. RODRIGUEZ: And we've never -- we've never
21 maintained anything else.

22 THE COURT: No, no. Nobody has maintained, neither
23 side has maintained anything else up to now.

24 MS. RODRIGUEZ: Interestingly, in this case, the
25 plaintiffs did try to argue that they were entitled to not

1 even setoff. But notwithstanding, the judge made a
2 distinction between actual earnings and earnings that could
3 have been earned. And he said, as to actual earnings, they're
4 in the case. Whether or not you pled mitigation, they're in
5 the case, actual earnings get set off.

6 THE COURT: Well, that's what I tried to say when I
7 came out on the bench, that's clearly in the case. And that
8 is mitigation, it's just -- it's just --

9 MS. RODRIGUEZ: But as far as those earnings that
10 could have been earned, after liability finding, after the
11 case is proceeding, those -- if the answer did not amend --
12 did not contain that affirmative defense, he was not allowing
13 them to, at the late date, amend the Answer to add mitigation
14 to damages, and that's where we are, Your Honor.

15 It was -- defendant's motion was not filed in a
16 pragmatically sufficient time. There is prejudice to the
17 plaintiffs by adding it at this late date, and it will cause
18 delay. And for all those reasons, defendant's motion should
19 be denied.

20 MR. COHEN: Your Honor, if I --

21 THE COURT: Let her sit down.

22 MR. COHEN: Oh, yeah, of course.

23 Do you want me at the podium, Your Honor?

24 THE COURT: No, that's personal preference. You can
25 go to the podium or you can stay there. I don't care.

1 MR. COHEN: I will stay here, Your Honor, if it's all
2 right.

3 Look, we will take a look at the case. I mean, I'm not
4 used to getting cases cited at arguments months after the
5 briefing's been filed. I'll just say that Judge Shadur -- I
6 went to the University of Chicago. I have classmates who
7 clerked for him, but -- and he's a fine judge, but there is a
8 circuit here, it's called the Third Circuit, and there are
9 lots of cases that we've cited that talk about how freely and
10 liberally motions to amend should be.

11 THE COURT: Posner would say that the Seventh covers
12 the whole country.

13 MR. COHEN: Yes, Your Honor. Some of the judges, who
14 were my law professors, they have a peculiar view of the
15 world.

16 But look, that has nothing to do with the what we're --
17 the law in this circuit -- and I want to get back to facts.
18 The law in this circuit couldn't be clearer, that motions to
19 amend are freely granted.

20 THE COURT: Well, that's the law, I believe,
21 basically, in every circuit. I mean, the general statement
22 that amendments should be freely granted in the interest of
23 justice, I don't know that -- I'm not aware of any circuit
24 that doesn't basically hold that, I mean, in a generalized
25 way. That's the law everywhere, and the state courts, as

1 well.

2 MR. COHEN: So, Your Honor, if I could just go to
3 these points. Let me start with the delay. It's easy to get
4 up on the plaintiff's side and say the case is 11 years old.
5 It is 11 years old. But when did they start seeking the
6 information from their class about setoff? On December 6th.
7 We're less than 30 days later than that. If they had accepted
8 our suggestion and added our questions to the questionnaire,
9 there would be zero delay, because we would be on exactly the
10 same timetable that they're on.

11 So now that we're saying -- now what we're saying is,
12 since they refused to ask these questions, we'll ask them.
13 There were some holidays. We are essentially a month behind.
14 In a case in which the class is seeking a billion dollars in
15 damages, according to their expert, before setoffs, you know,
16 a month's delay, which could have been avoided by the
17 plaintiffs simply tacking on our questions, is not a delay,
18 and you can't just get up and say we're prejudiced. What
19 prejudice? There's no prejudice.

20 You know, when this moved into the damages phase, in
21 the spring of 2012, we served Interrogatories and document
22 requests on them that clearly set out that we were pursuing a
23 mitigation defense. So we would be having exactly the same
24 discussion if we had made the motion on September 1 or
25 August 1, as we're having today. They full well knew that it

1 was our intent to do it. We had discussions with them in
2 November and December.

3 THE COURT: Well, what about their argument that
4 this -- if you look back to 11 years ago, at the point when
5 the Complaint is filed and the initial Answer is filed, why
6 isn't it in the case then?

7 MR. COHEN: Well --

8 THE COURT: I mean...

9 MR. COHEN: Your Honor, there's no doubt that it
10 could have been pled.

11 THE COURT: And the nature of this case probably made
12 it clearer than some that mitigation would be an issue. I
13 mean, the very nature of the case.

14 MR. COHEN: And I don't want to play the
15 I-wasn't-there game.

16 THE COURT: Well, you weren't.

17 MR. COHEN: I wasn't. And the fact of the matter is,
18 Your Honor, once -- you know, once the case was bifurcated,
19 you know, once -- no one was dealing with damages. The
20 damages discovery began a few months ago.

21 So, for example, when the named-plaintiffs' depositions
22 were taken, the class reps in September, we asked the
23 mitigation questions at the deposition.

24 THE COURT: I'm not talking about discovery.

25 MR. COHEN: Yes.

1 THE COURT: I'm talking about the argument that is
2 supported, by at least some cases, that the issue -- that when
3 the issue of mitigation is fairly clear from the outset of the
4 case, that it's -- that it could be an issue, that's when you
5 measure the time from, not from --

6 MR. COHEN: Right. And what I'm saying --

7 THE COURT: Not from when the parties kind of woke up
8 and said, okay, now we got to do this.

9 MR. COHEN: Your Honor, all of the cases about
10 liberal granting and freely granting amendments all come up in
11 context of cases where it could have been a circuit earlier.
12 We are not saying it could not have been a circuit earlier.
13 The question is against the backdrop of these cases, and the
14 reality of this case, whereas Your Honor has said, everyone
15 understood mitigation was an issue, and we have made it clear
16 to them since the beginning of damages discovery, is there
17 prejudice? Other than the word "prejudice," I don't hear it.

18 Is there delay? I don't think there's any delay. And
19 to the extent there's a modest month or so, it could have been
20 avoided. So is it futile? I don't think we can make a
21 finding of futility. They tried to argue that in their
22 papers. That's really a merits discussion.

23 So, Your Honor, yes, it could have been done earlier.
24 It would probably have been better if it had been done
25 earlier. The question is, should you exercise your discretion

1 to grant it now, and should these -- should these members of
2 the class, if they succeed in the damages phase in getting any
3 meaningful damages, should they get a windfall or should we
4 measure damages in the appropriate way?

5 THE COURT: Well, I'm going to exercise my
6 discretion. It's just a question of which way I'm going to
7 exercise it.

8 MR. COHEN: I walked right into that.

9 THE COURT: No question I'll be exercising my
10 discretion.

11 MR. COHEN: So, Your Honor, I mean, I think when we
12 look at the case law, all of these cases come up in the
13 context of the party opposing the amendment saying, you should
14 have done it earlier.

15 THE COURT: Yeah, that's exactly the context it
16 always comes up in.

17 MR. COHEN: But here we are, and the question is,
18 does this fit within the broad range of cases that grant a
19 free amendment? Given that we know it's been in the case,
20 that when the mediation shut down and the discovery began, we
21 immediately began seeking discovery relating to the mitigation
22 defense. We've quoted for you Ms. Rodriguez's own statement
23 from July of 2012 in a conference, where she said mitigation
24 is in the case.

25 You know, we know it's here. This is a gotcha. This

1 is not a case that should be decided on a gotcha. I mean, it
2 really shouldn't be, Your Honor.

3 THE COURT: All right. Okay. Thank you, Mr. Cohen.
4 Do you want to comment on the gotcha argument?

5 MS. RODRIGUEZ: Just very briefly, two issues of
6 prejudice. One is the fact that, when it wasn't in the case,
7 things like maintaining job applications over the last 11
8 years just hasn't been done, and it wasn't contemplated that
9 that would ever be an issue in this case.

10 The other thing is, and Mr. Cohen goes back to the
11 argument in -- or the Interrogatories and document requests
12 that were served in May of this year, that asked for very
13 specific information, that he says he contends should have put
14 us on notice that it was in the case.

15 At that time we refused to --

16 THE COURT: A little bit of a boot-strapping argument
17 there.

18 MS. RODRIGUEZ: Refused to produce the information,
19 saying, in fact, mitigation was not pled. So they were on
20 notice, at least as early as May, and they were on notice
21 before we started putting our expert report together.

22 I don't know that our expert methodology would have
23 been different if they had to contemplate this additional
24 layer of information. I'm not sure how it would have changed.
25 But it's certainly something that would have been contemplated

1 at that time, before a lot of time and a lot of money was
2 spent on methodologies and expert reports that did not include
3 that component of damages. Thank you.

4 THE COURT: Anything further?

5 MR. COHEN: Your Honor, if I could just respond to
6 that last bit. I just, you know -- their expert did an entire
7 report without considering setoff, and said, I'll deal with it
8 later as a subtraction. We're suggesting a second
9 subtraction. So I don't see how --

10 THE COURT: Well, yeah. I mean, I understand the
11 difference between, you know, a deduction for actual earnings
12 and a deduction for what you might have earned had you -- had
13 you put in the type of effort that we think you should have
14 put in.

15 MR. COHEN: My only point is, I can't see how it
16 would have affected their damages methodology.

17 THE COURT: No. All right. The -- I'm going to --
18 originally, I thought I might decide this from the bench but
19 I'm not. I'm going to -- I'm going to write something on it
20 and -- you know, in the next week or so. Could I see you,
21 though, all in my chambers? Around the corner.

22 RESPONSE: Yes, Your Honor.

23 MR. COHEN: May we leave the other things in the
24 courtroom?

25 THE COURT: I think so. Yeah, you can do that.

1 We will actually lock the door.
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I, **KAREN FRIEDLANDER, CCR, RMR**, Official United States Court Reporter and Certified Court Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel and that I am not financially interested in this action.

/S/ Karen Friedlander, CCR
KAREN FRIEDLANDER, CCR
Certificate No. 30XI00128200
Date: January 7, 2013

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Camden, New Jersey*

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